Supreme Court, U.S.
FILED
MAR 4 1998
CLERK

No. 97 - 910

In The

Supreme Court of the United States

October Term 1997

Carol Kiker and Devon Kiker

Petitioners,

vs.

Paul J. Miller, Jr.,
Individually and as Circuit Judge of the Circuit Court of Russell County,
and J. Pelham Ferrell,

Respondents

Petition for Writ of Certiorari to the United States Courtt of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

Carol Kiker
Devon Kiker
Pro Se
3211 14th Avenue
Phenix City, AL. 36867
(334) 297-3600

ARE CLAIMS PRECLUDED IN FEDERAL COURT WHERE CLAIMANT WAS SUBJECTED TO SHOW CAUSE HEARING IN STATE PROCEEDING AT WHICH HEARING OFFICER REFUSED HER THE RIGHT TO CROSS EXAMINE WITNESSES OR PRESENT HER OWN EVIDENCE, AND CLAIMANT SOUGHT STATE REVIEW BY COMMON LAW WRIT OF CERTIORARI?

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iii

I. STANDARD OF REVIEW IN THE ALABAMA SUPREME COURT..... 1

II. FERRELL'S ACTS CONSTITUTE CONSPIRACY.....4

III. PETITIONERS ARE ENTITLED TO NAME-CLEARING HEARING..... 5

IV. PETITIONERS FAILURE TO RAISE FIRST AMENDMENT ISSUES..... 7

CONCLUSION..... 8

TABLE OF AUTHORITIES

Buxton v. City of Plant City, Florida
871 F.2d 1037, (11th ir.1989)..... 7

Carlisle v. Phenix City Board of Education
543 So.2d 194 (Ala. 1989).....3

Fortson v. Hawkins, 321 So.2d 196 (Ala.1975)..... 1

Henderson v. Montgomery City-County Personnel
Board, 695 So.2d 9 (Ala. 1996).....3

Kiker v. Miller, 639 So.2d 961.....1

Linch v. Scott, 93 So.2d 198 (Ala.1953)..... 3

Mitchell Motor Co. v. Burrow, 66 So.2d 198 (1953)..... ... 3

Mullane v. Central Hanover Bank & Trust Co.
70 S.Ct. 652,(1950)..... 9

Thompson v. Bass, 616 F.2d 1259 (11th
Cir.1980)..... 3

1. STANDARD OF REVIEW IN THE ALABAMA SUPREME COURT

Respondent Ferrell insists that the Alabama Supreme Court reviewed the administrative "hearing" afforded Carol Kiker under a direct appeal, but offers no evidence whatsoever of any statutorial right to such appeal. Likewise Ferrell does not provide evidence that any similar case has ever been reviewed by direct appeal. The only modern case addressing the removal of a register in Alabama is the case of Fortson vs. Hawkins 321 So.2d 196 (1975). In the *Fortson* opinion the court said:

> "A discharged salaried county register filed original petition for writ of mandamus, prohibition or certiorari seeking reinstatement by the county's presiding judge who had ordered her removal ....." (emphasis added).

It is clear from the above language that *Fortson* was reviewed on an extraordinary writ and not by direct appeal. The petition filed in Carol Kiker's request for review by the Alabama Supreme Court was entitled: NOTICE OF APPEAL OR IN THE ALTERNATIVE FOR WRIT OF MANDAMUS, PROHIBITION OR CERTIORARI. The court affirmed without an opinion and without explaining the standard for review. Kiker v. Miller, 639 So.2d 961

Contrary to Ferrell's assertions, Carol Kiker did file a request for re-hearing in which she urged the court to render a written opinion. The following language is taken from the conclusion of the brief on request for re-hearing.

> "Based on the foregoing, Appellant would respectfully submit that the actions of Judge Miller were violative of her constitutional rights to procedural due process and that this Honorable Court erred in affirming her removal from office without offering even an opinion explaining its reasoning. To allow this action to stand casts doubt upon the integrity of the judicial system when it comes to judging the actions of one of its own." (emphasis added)

The Alabama Supreme Court could not have decided the issues raised in Petitioners' Section 1983 suit. The Alabama court could not award punitive damages prayed for in the federal court action. The court did not have the benefit of any of petitioner's evidence as to the pretextual nature of the respondents' actions, nor evidence of the respondents' conspiracy to restrict the record.

The best evidence that the Alabama Supreme Court did not review the administrative hearing for compliance with due process is the transcript of the hearing itself. It is disingenuous for Ferrell to argue to this court that the Alabama Supreme Court ruled that such an outrageous parody comported with the requirements of due process. Further, the Alabama Supreme Court had earlier ruled in the mandamus proceeding for Judge Miller's recusal that Carol Kiker was entitled to no hearing whatsoever prior to being removed from office. Therefore, the question becomes "What relief was available in the Alabama Supreme Court?" Clearly that court did not recognize the "for cause" standard in the statute providing for removal of a register as constituting a property interest triggering due process. Such position is in direct conflict with case law of the Eleventh Circuit.

> "A state employee that may be discharged at will under state law has no property interest in his or her job but a state employee whose employment may be terminated only for cause has a property interest in the state employment and is entitled to due process protection." Thompson v Bass, 616 F.2d 1259 (1980)

Ferrell makes much ado of the Alabama Supreme Court's usage of the words "affirmed" and "judgment" in their disposition of the review of Carol Kiker's removal from office as his proof that the case was heard on direct appeal. This is a wholly frivolous argument as a quick perusal of cases reviewed on certiorari reveal that it has long been the custom of that court to use such language. See Henderson v Montgomery City-County Personnel Board, 695 So 2d 9 (1996), Mitchell Motor Co. v Burrow, 66 So 2d 198 (1953), Linch v. Scott, 93 So 326 (1922)

Further, the Alabama Supreme Court, has settled the question of whether a federal civil rights case is barred after having been appealed through the Alabama courts. In 1989, the court answered a certified question from the United States District Court for the Middle District of Alabama. It held that neither doctrine of res judicata nor collateral estoppel bars state courts from hearing a teacher complain of wrongful transfer on theory of violation of federal civil rights law after the teacher, for same factual transaction, had processed previous proceeding pursuant to state statutory rights Carlisle v. Phenix City Board of Education, 543 So.2d 194 (1989)

II. FERRELL'S ACTS CONSTITUTE CONSPIRACY

Ferrell understandably attempts to distance himself from Respondent Miller's actions in this case. However, the record in the case does not support such position. There is evidence that approximately six months prior to the filing of the cases involving the Kikers' sons which were used for Carol Kiker's removal from office, respondents attempted to bring charges of jury tampering against petitioners. When that effort failed, they turned to the domestic cases as the basis for their actions.

There is evidence that Ferrell counseled Miller to grant a continuance in the administrative hearing "to avoid a technicality." There is also evidence that Ferrell approached a potential witness, the Russell County District Attorney, for the purpose of dissuading him from acting favorably to petitioners.

Ferrell has admitted that he carried a report to Miller that Carol Kiker had discussed rumors of Miller's alleged affair with his secretary. Ferrell has further admitted that the report was false and that he could name no person who had ever informed him of any such conduct by Carol Kiker. Shortly after making this false report, Ferrell accepted Miller's appointment to serve as amicus curiae in the action brought against Carol Kiker despite the Alabama Canons of Judicial Ethics which require that such person be "disinterested and impartial." Canon 3(A)4, Alabama Canons of Judicial Ethics.

Ferrell's assertion that he attended the administrative hearing simply as an "old friend" of Miller is in error. The following

undisputed testimony was given by Hon. David B. Bryne who represented Carol Kiker at the administrative hearing:

> "Q. And state again, if you don't mind, because maybe I'm not recalling it exactly, what did Mr. Ferrell say to you that morning was his reason for being present?"
>
> "A. My recollection is that about the time we got to the top of that stairwell, counsel approached us and said, "let me speak to you for a moment." And we conversed in the hall, and he made the statement that, "I've been asked by Judge Miller to serve as amicus. I wanted to let you know about that.""

Ferrell attended the administrative hearing and sent signals to Miller as to the rulings on evidence by nodding or shaking his head to ensure that the record would contain no exculpatory evidence.

Deposition testimony was elicited that Ferrell met with Miller and his secretary at the county courthouse on a state holiday the day before the order removing Carol Kiker was filed. The meeting lasted several hours in the building that was closed to the public. Petitioners contend that the meeting was for the purpose of preparing the order of removal.

III. PETITIONERS ARE ENTITLED TO NAME-CLEARING HEARING.

Ferrell claims that petitioners are not entitled to a name-clearing hearing under *Buxton* because the element of *falsity* is

not present in this case. Deposition testimony has been taken from the other judges of the circuit that prove the findings in the order removing Carol Kiker from office are completely false. Respondent Miller also admitted on deposition that the findings were false. As an example, in the order removing Carol Kiker from office, respondents made the following finding in paragraph 6:

> "That both of the petitioners, former daughters-in-law of the Register and Clerk of this Court, suffered monetary losses in child support and potential deprivation of medical care of their children since these cases were not treated in the ordinary course of business."

When Miller was questioned about this finding on deposition the following testimony was given:

Q. "Okay. Were either-------"

A. "Whether they're (sic) lost money in that, I don't know."

Q. "You don't know if they lost anything?"

A. "I don't know if they lost money, no, sir"

Petitioners have served collectively for more than 56 years in the Circuit Court of Russell County, Alabama. Prior to the attack on their character by respondents, petitioners enjoyed a reputation for honesty and integrity both personally and professionally. Respondents contrived to ravage the good name of petitioners, and by doing so foreclosed other employment

opportunities to Carol Kiker. Respondents were required to provide a name- clearing hearing.

> "We hold that a public employer is required to provide the opportunity for a post-termination name-clearing hearing when stigmatizing information is made part of the public records, or otherwise published. Notice of the right to such a hearing is required." Buxton v. City of Plant City, Florida, 871 F.2d 1037, (11th Cir. 1989)

Five years later, petitioners have still not been afforded a name-clearing opportunity to remove the stigma placed on their name by respondents.

IV. PETITIONERS FAILURE TO RAISE FIRST AMENDMENT ISSUES.

Respondents raise in brief the petitioners' failure to appeal the jury's verdict on the first amendment issues. Petitioners respond as follows: This case was filed in the District Court on January 18, 1994. Respondents forthwith filed a motion to dismiss. For the next 17 months the district court failed to rule on the motion to dismiss. Petitioners were not allowed to proceed with deposition testimony during this time despite filing numerous motions to be allowed to do so. Beginning in July of 1992 and continuing during this period petitioners were pummeled with adverse publicity generated by respondent Miller's accusations, and his findings that respondents had committed misfeasance in office. In October of 1995 the district court ordered a trial on the first amendment issues only, and allowed depositions. By this time the events relative to the case

were four years old and much testimony favorable to petitioners had been lost.

The district court summarily denied petitioners' motion for a name-clearing hearing without addressing the precepts of *Buxton*. Petitioners' motion to take an interlocutory appeal to address the denial of a name-clearing hearing was denied. Thus, petitioners were put to trial in April of 1996 on the first amendment issue after bearing four years of adverse publicity in the entire geographical area from which the jury pool was drawn. The publicity was, in large part, generated and urged by respondents.

Petitioners, who are not attorneys, have incurred expenses of approximately $70,000 in their efforts to remove the stigma placed on the their name by respondents. These expenses were incurred during the time that Carol Kiker has been deprived of approximately $280,000 in income. Petitioners' decision not to appeal the jury verdict was based on economic considerations, and not because there was no merit in such an appeal. Likewise, petitioners have failed to raise all the issues that are worthy of review simply because they lack the resources and the expertise to do so.

CONCLUSION

Petitioners, in pursuing their case to this level, have relied on the constitutional guarantees of due process enunciated by this court.

> "An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the

> nature of the case." Mullane v. Central Hanover Bank & Trust Co., 70 S.Ct. 652, (1950)

Here, the loss to petitioners is one of the most profound losses one can bear: the loss to an entire family of their good name. Secondarily is the financial devastation caused by the loss of income. The false accusations of respondents are particularly cruel and injurious to petitioners as they imply that petitioners are so base in character that they acted to withhold support money from their own grandchildren. Respondents, who are both seasoned in the practice of law, knew of the legal duty to provide due process protections prior to, and after, ravaging the good name of a family and prior to the deprivation of property in the form of income. They have arrogantly ignored that responsibility and have based their entire defense in this case on technical issues of estoppel, rather than defending their deplorable conduct. Both respondents have experience with the frailties of Alabama's common law certiorari and have contrived in this case to take advantage of its deficiencies. There can be no other explanation - and indeed neither respondent has offered any - for their conduct of the administrative hearing. To allow the district court's dismissal of the due process issues in this case to stand is a gross miscarriage of justice and puts at risk the numerous other employees in Alabama whose removal is subject to a "for cause" standard.

Petitioners respectfully request that the court grant the Petition for Writ of Certiorari.